No. 95-224

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARBARA KRAEBEL Doing Business As BARKLEE REALTY COMPANY,

Petitioner,

- against -

FELICE MICHETTI, As Commissioner of the New York City Department of Housing Preservation and Development, and THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

*LEONARD J. KOERNER,**
PAMELA DOLGOW,
FAY NG,
of Counsel.

** Attorney of Record*

PAUL A. CROTTY,
Corporation Counsel
of the City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-1034

September 21, 1995

COUNTER-QUESTIONS PRESENTED

1. Where petitioner, pro se, the owner of a sixteen-unit residential building which has been cited for violations of the New York City Housing Maintenance Code ("HMC") alleges that the HMC enforcement scheme violates procedural due process, whether the Court of Appeals properly affirmed the dismissal of her due process claims where the State provides adequate procedures whereby she may challenge Housing Code violations before there is any final deprivation of a protected interest and where petitioner has not availed herself of such procedures?

2. Whether petitioner's remaining claims were properly dismissed?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

(a)

This is an action commenced pursuant to 42 U.S.C. § 1983 by petitioner, pro

se, Barbara Kraebel ("petitioner"), against defendants-respondents, the New York City Department of Housing Preservation and Development ("HPD") and HPD Commissioner Michetti ("defendants"). Petitioner alleges that HPD's issuance of housing violations against her property violated her constitutional rights. Petitioner seeks to have this Court review by way of certiorari a summary order of the United States Court of Appeals for the Second Circuit, entered May 8, 1995, which affirmed a judgment of the District Court for the Southern District of New York (Martin, D.C.J.), entered August 30, 1994. The District Court (1) granted the defendants summary judgment dismissing the complaint and (2) denied plaintiff's cross-motion for summary judgment.

(b)

The New York City Department of Housing Preservation and Development (HPD) enforces the New York City Housing Maintenance Code.[1] HPD has jurisdiction over 135,000 multiple dwellings and there are currently over three million outstanding HMC violations recorded (113, ¶ 9).[2]

If an inspection discloses HMC violations, the inspector will issue a Notice of Violation which directs the owner to repair the condition. The owner

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[1] New York City Administrative Code, § 27-2000, et. seq. Hereinafter, provisions of the Housing Maintenance Code will be cited as "HMC" followed by the specific section of the Code being cited.

[2] Numbers in parentheses refer to pages of the Joint Appendix submitted to the Court of Appeals for the Second Circuit; numbers preceded by the letter "A" refer to the Appendix annexed to the Petition for a Writ of Certiorari.

is also advised that he or she may be subject to fines for the failure to cure the violation. A Notice of Violation, however, is not self-executing. To collect a fine, HPD must commence an action in the Housing Part of the New York City Civil Court and obtain a judgment. In such an action, the building owner may interpose defenses, including alleging that the violations were improperly issued or have been cured. HMC § 27-2116; (112, ¶¶ 7-8).

Owners may seek to have a violation removed from the record before an enforcement action is commenced by availing themselves of a number of options. First, an owner can certify on the Notice of Violation that the violation has been cured and return it to HPD. This certification must be made

within a specific statutory time period. Upon receipt of the certification, HPD has 70 days to reinspect the premises. If no inspection is made within this time period, the violation is deemed corrected. HMC § 27-2115(f)(3);(111;¶4).

If the owner is unable to make this certification within the statutory time period set forth for the certification process, he or she can then proceed under the Dismissal Request Inspection Program, 28 R.C.N.Y. Ch. 9 (1991). Under this program, upon payment of a $300 fee, an owner may request a re-inspection to determine whether the violations have been cured. 28 R.C.N.Y. §§ 9-03, 9-04.

Finally, if an owner believes that a violation was erroneously or unlawfully issued or if he or she has a valid defense to the violation, the owner may

commence a proceeding in the Housing Part of the New York City Civil Court to contest the violation (114, ¶ 10); HMC § 27-2117(b); N.Y. Civil Court Act § 110.

(c)

Petitioner is the owner of a sixteen-unit residential building located at 205 West 147th Street, Manhattan, New York City ("subject buildings").

The subject building, which petitioner purchased in 1983 for $35,000, is subject to the New York Rent Control and Rent Stabilization Laws, and has a yearly rent role of $50,400 (48, ¶ 41; 67, ¶ 147). Presently, there are thirty-one violations outstanding against the subject building: eight Class A ("non-hazardous") violations, 22 Class B ("hazardous") violations and one Class C

("immediately hazardous") violation (45, ¶ 25).

Pursuant to the certification process set forth in HMC, § 27-2115(f)(3), petitioner certified that some of the violations have been corrected. HPD, however, determined either that (1) the certifications were untimely or (2) the violations still exist (Pet., pp. 6-7).

Petitioner has not applied for a re-inspection of her property pursuant to HPD's Dismissal Request Program[3]. Further, petitioner can, but has not, commenced a proceeding to challenge the violations in a proceeding in the state

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[3] After meeting with petitioner regarding the violations outstanding against her property, HPD offered to re-inspect her property pursuant to the Dismissal Request Program without requiring her to pay a fee. Petitioner, however, declined this offer (73, ¶ 5).

courts. Finally, HPD has not commenced a judicial proceeding to enforce the Notices of Violation and thus, no finding of liability has been made against petitioner or any penalties imposed upon her.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit unanimously affirmed the District Court's judgment granting the respondents summary judgment dismissing the complaint (A1a-3a). Upon review of all of the parties' contentions, the Court of Appeals affirmed "substantially for the reasons set forth in the district court's comprehensive opinion" (A3a).

In a Memorandum Opinion and Order dated August 19, 1994, the District Court granted defendants summary judgment,

denied petitioner's motion for partial summary judgment and dismissed the complaint (A4a-A29a). The District Court detailed HPD's enforcement scheme and then addressed and analyzed each of plaintiff's claims separately, as discussed more fully below.

REASONS FOR DENYING THE WRIT

A. PETITIONER'S DUE PROCESS CLAIMS WERE PROPERLY DISMISSED. PETITIONER HAS NOT BEEN DEPRIVED OF ANY PROTECTED PROPERTY INTEREST. ASSUMING, ARGUENDO, THAT PLAINTIFF HAS BEEN DEPRIVED OF A PROTECTED INTEREST, HER DUE PROCESS CLAIMS WERE NEVERTHELESS PROPERLY DISMISSED SINCE THE STATE PROVIDED ADEQUATE PROCEDURES WHEREBY OWNERS MAY CHALLENGE HOUSING VIOLATIONS AND HAVE THEM REMOVED FROM THE RECORD BEFORE THERE IS ANY FINAL DEPRIVATION OF A PROTECTED INTEREST.

(1)

Petitioner alleges that the HMC enforcement scheme violates due process because HPD does not provide owners with an adequate mechanism to clear up violations of record where the violations were either issued erroneously or have been corrected (Pet.,pp.16-20). In dismissing her due process claims, the District Court properly held that petitioner has not alleged that she has been deprived of a constitutionally protected property right, reasoning that she did not have any "entitlement to an unblemished housing record" (A10a) (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)).

Assuming, arguendo, however, that petitioner has adequately alleged a deprivation of a protected property

interest, petitioner's due process claims were still inadequate as a matter of law because any deprivation was not without due process. Zinermon v. Burch, 494 U.S. 113 (1990) ("In procedural due process claims, the deprivation by state action of a constitutionally protected interest . .. is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.") (Emphasis in the original).

The District Court properly found in this case that the adequate state procedures which exist for "clearing erroneous or obsolete violations from an owner's record more than adequately provide plaintiff with several meaningful opportunities to contest the findings of

violation prior to any deprivation of property" (A15a).

In this case, the only enforcement action taken against petitioner was the issuance of Notices of Violation. The issuance of a Notice of Violation, however, does not finally deprive her of a protected interest since the Notice of Violation is not self-executing. The only method by which HPD can obtain civil penalties or fines for housing violations is to commence a proceeding in the Housing Part of the New York City Civil Court. HMC § 2116. In any such proceeding, petitioner may assert as a defense that the violations were improperly issued or have been corrected. HMC § 2116(b). Thus, petitioner has an adequate opportunity to contest the Notices of Violation before any liability

is imposed against her. In fact, in Department of Housing Preservation and Development v. DeBona, 101 A.D.2d 875, 476 N.Y.S.2d 190 (2d Dept. 1984), the New York State Appellate Division held that the Housing Maintenance Code afforded owners a constitutionally adequate opportunity to contest a violation prior to the deprivation of any property rights because an owner could challenge a violation by interposing a defense in an enforcement action before any finding of liability is made.

Contrary to petitioner's contention, she need not sit and wait until HPD commences an enforcement action to have the violations removed from record.

First, an owner may seek to remove a violation by certifying on the Notice of Violation that the violations listed

therein have been corrected. HPD then has 70 days from that certification to re-inspect the premises. If HPD fails to do so, the violations are deemed corrected as a matter of law. HMC § 2115(f).

Petitioner alleges that HPD has improperly rejected some of her certifications as either "untimely"[4] or "false".[5] (Pet., pp. 6-7). As discussed below, petitioner could have, but failed to, commence a proceeding to challenge these determinations or seek a new inspection to determine if the violation still exists.

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[4] By statute, certifications must be completed within a specific time period after the issuance of a Notice of Violations.

[5] In such cases, HPD has determined that the violations have not been cured.

First, petitioner could have requested a re-inspection pursuant to HPD's Dismissal Request Program. 28 R.C.N.Y. Ch. 9. Upon payment of a $300 fee, the owner may request a re-inspection of the property and HPD will make all efforts to re-inspect and issue an inspection report within forty-five days of the request. If no inspection report is issued within forty-five days, the fee will then be refunded to the owner, but the process will continue and a re-inspection will be made in the regular course of business. Contrary to petitioner's argument, this process is not inadequate simply because she must pay a fee for the re-inspection since "[t]he State may erect reasonable procedural requirements for triggering the right to an adjudication" including

the imposition of filing fees. Logan v. Zimmerman Brush Co., 455 U.S. 432, 437 (1982). Further, HPD, in this case, has offered to reinspect her property pursuant to the Dismissal Request Program and has offered to waive the fee. Petitioner has declined this offer (73, ¶5).

Additionally, petitioner can commence a proceeding in the Housing Part of the New York City Civil Court to challenge a Notice of Violation pursuant to Section 27-2117(b) of the HMC.[6]

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[6] HMC, § 27-2117 (b) provides:

(b) Nothing in this article [the enforcement article of the Housing Maintenance Code] shall prevent an owner from contesting the finding of a violation by the department, in advance of the department's action for the collection of penalties in the housing part of the civil court of the city of New York or by any other means provided by law. In any such action or (continued...)

Section 110 of the New York City Civil Court Act specifically provides that the Housing Part of the Civil Court shall have jurisdiction over proceedings commenced to challenge housing violations.[7] Wholly without merit is

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[6] (...continued)
proceeding, the court may stay the further accumulation of the per diem penalty in the same manner and under the same conditions as provided in subdivision (a) of this section.

[7] Section 110 of the Civil Court Act provides, in pertinent part:

§ 110. Housing part

(a) A part of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York, as follows:

* * *

(7) Actions and proceedings for the removal of housing violations recorded pursuant to such laws, or for the imposition of such violation or for the (continued...)

petitioner's argument that this process is not adequate because of the quality of the judges and the proceedings in the Civil Court. Petitioner has not availed herself of this option and if she had, she could have sought appellate review of any adverse decision of the Civil Court. 22 N.Y.C.R.R. §§ 640.1, 730.1.

In sum, the District Court properly found that adequate opportunities exist to contest the Notices of Violation before any final determination of liability is made against petitioner. These remedies include the right to (1) assert defenses in any enforcement action (2) certify that the condition is cured (3) request a reinspection and (4)

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[7] (...continued)
stay of any penalty thereunder.(Emphasis added).

commence a proceeding in State Court to challenge the Notice of Violation.

(2)

The District Court also properly dismissed petitioner's ninth cause of action alleging that Section 328.3 of the New York Multiple Dwelling Law and HMC § 27-2121 violate due process. These sections provide that in any action or proceeding involving a particular building, HPD shall provide access of its violation files for that building to the Housing Court and that such records "will be prima facie evidence of any matter stated therein." Petitioner alleges that the application of Section 328.3 has resulted in the Housing Court issuing orders abating rent in two dispossess proceedings as well as a delay in the

granting of her 1994-95 application for a maximum rent increase (Pet., pp. 17-18).

The District Court concluded that Section 328.2 and HMC, § 27-2121 did not violate due process, reasoning that petitioner has adequate opportunities to rebut the rebuttable presumption by challenging the violation and presenting her evidence in a proceeding in Housing Court (A18a-19a).

With respect to applications for maximum rent increases, petitioner can file a certification with the Department of Housing and Community Renewal certifying that the violations have been cleared or corrected. Alternatively, petitioner can seek a waiver of the violations by submitting proof supporting

her challenge to the violations (A20a).

(3)

Petitioner's claim that the Notices of Violation were vague and that she had to guess at what was necessary to cure the violations (Petition, p.13) is completely meritless. The Notice of Violation form specifically advises an owner that, at his or her request, "the Department will confer with you concerning the nature and extent of the work required for compliance with the law and methods of financing the required work" (122). In fact, HMC, § 27-2115(b) requires HPD to provide such assistance.

(4)

Finally, petitioner's claim that owners should be present during inspections is meritless. Due process does not require petitioner's presence at

inspections since there has been no deprivation of property or adjudication of rights at that time. See generally, Mathews v. Eldridge, 424 U.S. 319 (1976).

B. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S REMAINING CLAIMS.

In dismissing plaintiff's equal protection claims, the District Court properly reasoned that since plaintiff was not a member of a suspect class and because she has not alleged that HPD has burdened a fundamental right, "the challenged actions will not be unlawful unless they are not 'rationally related' to a legitimate government purpose" (A20a). See, Pennell v. City of the San Jose, 485 U.S. 1, 14-15 (1988); Kraebel v. New York City Dept. of Housing Preservation and Development, 959 F.2d 395, 402 (2d Cir.), cert. den., 113 S.Ct.

326 (1992). The Court then concluded that (27):

> It would be both financially and physically impossible for defendants to inspect each and every building subject to the code and to bring enforcement actions in every case of a violation. Therefore, the Court can find nothing irrational in defendants' decision to enforce the code selectively, especially absent any evidence produced by plaintiff of any malicious intent on the part of defendants in inspecting her property.

As the District Court properly found, petitioner submitted no evidence of any malicious intent on the part of HPD with respect to her property.

In dismissing petitioner's fourth amendment claims, the District Court properly held that inspections by housing inspectors do not violate the landlord's fourth amendment rights where tenants have consented to inspections of their

own apartments and common areas (A21a-22a). See, United States v. Buettner - Janusch, 646 F.2d 759 (2d Cir.), cert. denied, 454 U.S. 830 (1981) (persons with control over a common areas can consent to a search). Petitioner alleges that the inspections in this case were unsolicited (Pet., p. 14). The District Court, however, found that petitioner failed to produce any evidence creating an issue of fact in opposition to HPD's proof that access for the inspections was provided by tenants. The fact that the District Court may have erred in making this finding is not a basis for granting a writ of certiorari.

Finally, the District Court properly held that petitioner's claim that she is subjected to excessive fines is not ripe for review because there have been no

fines imposed, no enforcement proceedings commenced, and no liability for fines determined (A24a-A25a). Cheffer v. Reno, 55 F.3d 1517, 1523 (11th Cir., 1995) ("Eighth Amendment challenges generally are not ripe until the imposition, or immediately impending imposition, of a challenged punishment or fine").

Contrary to petitioner's argument (Pet., pp 16-17), this case is not in conflict with Steffel v. Thompson, 415 U.S. 452 (1974) or Ex parte Young, 209 U.S. 123 (1908). In Steffel, petitioner challenged a criminal statute which threatened prosecution for the exercise of his first amendment rights. The issue there was whether federal declaratory relief was available where there has been no pending state criminal prosecution. This case does not involve the chilling

effect threatened prosecution has on the exercise of first amendment rights.

In Young, the statute involved threatened criminal prosecution and severe penalties for the failure to comply with a railroad rate schedule setting forth the rates which could be charged to the public. The petitioners alleged that the rates were so low that the statute constituted a taking of property. This Court determined that petitioners could challenge the statute even though there has been no violation of the statute and thus, no enforcement action taken. This Court reasoned that no one would risk prosecution by overcharging in violation of the statute. Thus, Court review of the statute would be effectively foreclosed if a pending prosecution was a precondition to a

challenge. This case does not present the concerns voiced by this Court in Ex-Parte Young to support an exception to the general rule that Eighth Amendment claims are not ripe for review until there has been, or there is an impending imposition of, fines.

For all the above reasons, the petition for a writ of certiorari should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

PAUL A. CROTTY,
Corporation Counsel of
the City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
PAMELA DOLGOW,
FAY NG,
of Counsel.

*Attorney of Record